

operator makes programming choices available through a menu or other selection mechanism which does not tie a particular service or program supplier to a particular numerical channel, DBS providers should have the flexibility to allocate capacity on the satellite in the most efficient manner. As long as the public can find and select the noncommercial educational programs easily, the purposes of Section 25(b) are served. Thus, it is sufficient that the educational material is clearly identified in the menu as noncommercial, in a consistent manner over time and in a manner that is consistent with other DBS program services.

**2. The Capacity Made Available for Noncommercial Use Should Increase Over Time**

APTS and CPB also support the Commission's suggestion that the reservation requirement increase over time. Notice at ¶ 40. As DBS matures and reaches a greater percentage of the population, it will be able to support a greater number of noncommercial channels. Therefore, APTS and CPB recommend that satellite licensees that are initially required to make less than 7% of their capacity available under Section 25(b) should be required to increase that capacity by 1% a year commencing with the fourth year after the satellite begins operation until at least 7% percent is available for noncommercial use. By the beginning of the fourth year, DBS providers should have attained a sufficient market penetration to be able to absorb these

additional demands without adversely affecting their profitability.<sup>17/</sup>

**3. The Obligation to Make Capacity Available Should Vest Immediately and Existing Satellite Contracts Should Not be Grandfathered**

In the Notice, the Commission asked whether the requirements of Section 25(b) should preempt existing contracts between DBS providers and program suppliers or whether the obligation should vest upon the expiration of those contracts. Notice at ¶ 40. In light of the congressional objective underlying Section 25(b), the Commission should interpret the Section as preempting existing contracts for DBS satellite capacity, to the extent that they interfere with the rights afforded noncommercial program suppliers. Grandfathering such contracts could postpone the effectiveness of Section 25 and delay the public's access to the educational and informational programming. Thus, postponing this requirement until the current contracts expire will frustrate Congress' goal in enacting Section 25(b) by unreasonably delaying the availability of noncommercial programs.<sup>18/</sup>

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<sup>17/</sup> Once a licensee is required to assure that 7% of the satellite's DBS capacity is available for noncommercial use, that obligation should apply to any replacement satellite. The replacement satellite continues the operation of the earlier bird and should not be treated as a new offering.

<sup>18/</sup> If the Commission concludes that existing contracts should be grandfathered, APTS and CPB strongly urge it to grandfather only the current term of those contracts. Renewal terms should clearly not be grandfathered. In cases where contracts provide for a number of renewal terms, grandfathering the renewal terms could effectively preclude the implementation of Section 25(b). Further, only contracts executed prior to the date the Act was enacted should be grandfathered.

**4. Noncommercial Programming Should Be Offered to Viewers As Part of the Lowest-Price Tier of Programming**

In any "pay-television" system such as DBS, it is customary for operators to charge viewers monthly or on a per-program basis for access to the programming. APTS and CPB are concerned, however, lest such a payment mechanism impair the objectives of Section 25(b) by imposing on subscribers excessive program fees for access to noncommercial programming, or by requiring subscribers to purchase additional equipment to receive noncommercial programming.

Accordingly, as a part of the satellite licensee's obligation to make capacity available to noncommercial program suppliers, the Commission should require the licensee to insure that (a) regular noncommercial programming is available to subscribers from the DBS operator as part of the lowest-price "tier" of programming, (b) special-event noncommercial programming is available to subscribers from the DBS operator at the lowest per-program-hour rate charged for any pay-per-programming, and (c) the subscriber is required to purchase no equipment other than the lowest priced basic receive equipment to obtain the noncommercial programming. These requirements will, consistent with the purpose of Section 25, insure that the American public has reasonable access to noncommercial programming.

**A. The Commission Should Incorporate the Relevant Definitions in Section 397 of the Communications Act**

19/ Section 397(6) defines a "noncommercial educational broadcast station" and a "public broadcast station" as a television or radio station which:

(A) under the rules and regulations of the Commission in effect on the effective date of this paragraph, is eligible to be licensed by the Commission as a noncommercial educational radio or television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned and operated by a municipality and which transmits only noncommercial programs for education purposes.

Section 397(12) defines a "public telecommunications entity" as

APTS and CPB support this proposal. Congress has already determined that the entities defined in Section 397 of the Communications Act provide noncommercial educational programming that serves the public, and has funded their efforts through the Public Telecommunications Facilities Program and CPB community service and program grants. Consequently, it is clear that these entities will offer the programming services Congress intended to make available to the public when it enacted Section 25(b).

Moreover, the definitions in Section 397 of the Communications Act insure that public television licensees, PBS,

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<sup>19/</sup> (...continued)

(B) disseminates public telecommunications services to the public.

And, Section 397(7) defines the term "noncommercial telecommunications entity to mean:

any enterprise which--

(A) is owned and operated by a State, a political or special purpose subdivision of a State, a public agency, or a nonprofit foundation, corporation, or association; and

(B) has been organized primarily for the purpose of disseminating audio or video noncommercial educational and cultural programs to the public by means other than a primary television or radio broadcast station, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, microwave, or laser transmission through the atmosphere.

and other existing public television and educational programming suppliers, such as the American Program Service, Children's Television Workshop, and the regional public telecommunications networks, will have access to reserved noncommercial DBS channel capacity, as Congress clearly intended. No new definitions or qualifying organizations are necessary to further Congress' intent that noncommercial educational program suppliers utilize

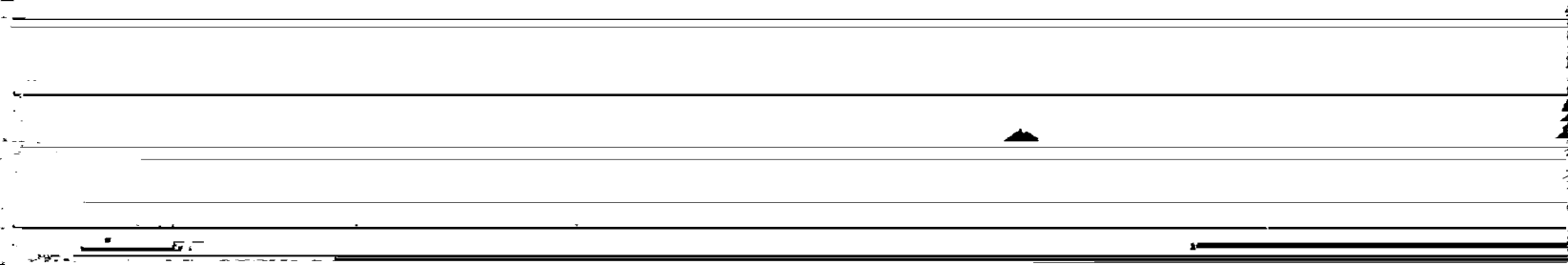
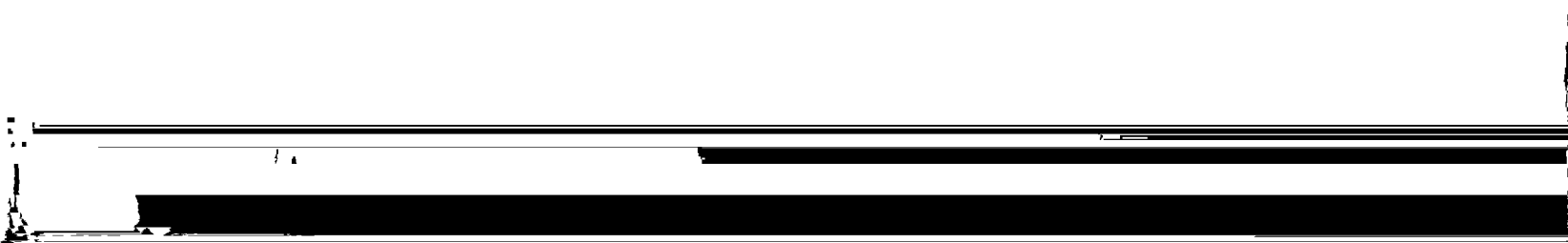

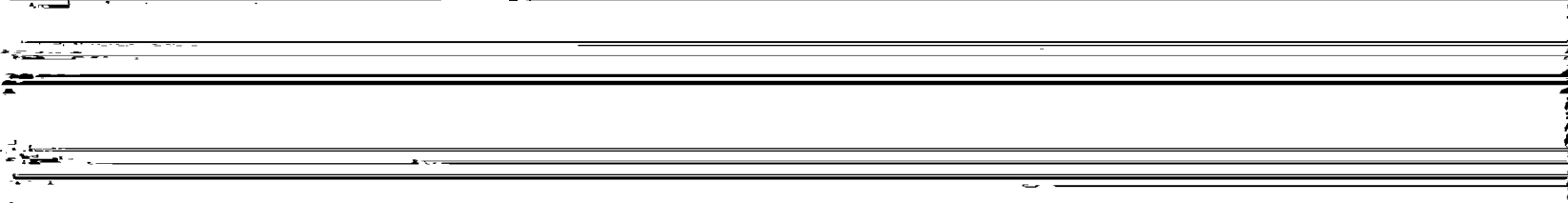
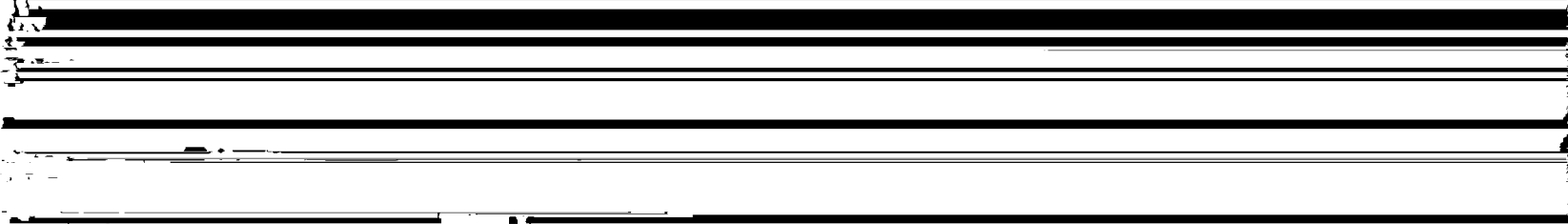

**B.    The Commission Should Prohibit any Ownership or Similar Relationship Between the Noncommercial Program Supplier and the DBS Provider or Licensee That Would Give the Licensee or Provider De Facto or De Jure Control of the Educational User**

The Commission questions whether it should include a prohibition on corporate relationships between entities providing DBS service and those that are eligible to use the reserved noncommercial channels. Notice at ¶ 43. APTS and CPB submit that it should, so that DBS providers or satellite licensees do not create sham entities which may not offer the kind of educational and informational programming Congress envisioned when it enacted Section 25(b). Congress limited the class of entities eligible to use Section 25(b) capacity to those entities which it believed were bona fide educational institutions and organizations. By so doing, it acted to insure that the Section 25(b) capacity would be used for meaningful educational and informational programming. Allowing affiliations between the DBS provider or the satellite licensee and the educational user would undermine this protection. It would create an incentive for a DBS provider to create its own "educational programmer" to whom it would give the capacity, without regard to the quality of educational and informational programming that might be offered.

Indeed, the Commission faced a similar problem involving ITFS applicants who were stalking horses for commercial MMDS operators. While in those cases the Commission was in a position to review the bona fides of the ITFS applicants, it will not necessarily have the power here, since no prior approval will be

required before capacity is made available to a noncommercial program supplier. Consequently, prohibiting affiliations of DBS providers or satellite licensees and noncommercial program suppliers will have a beneficial prophylactic effect in assuring that the reserved capacity is used for meaningfully.

Accordingly, ADPS and GPR urge the Commission to conclude





Those provisions prohibit the broadcast of promotional material on behalf of for profit entities and impose certain other limitations on political programming. Those provisions were designed to insure that the funding of noncommercial programming services does not undermine congressional and Commission objectives for public broadcasting.<sup>22/</sup> Similar factors will work as effectively with respect to DBS operations.

Further, drafting any definition would be difficult and applying the definition to specific programs will be even more problematic. Indeed, any effort by the Commission to enforce a definition would require the Commission to review editorial decisions of programmers, enmeshing it in sensitive First Amendment issues. The Commission has wisely eschewed any such role in its regulation of public broadcasters and should follow the same course here. By defining the types of entities that are eligible to use the reserved channels, the Commission will assure that the programming offered will advance Congress' goals.<sup>23/</sup>

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<sup>22/</sup> Noncommercial Nature of Educational Broadcast Stations, 86 F.C.C. 2d 141 (1981) as modified, 90 F.C.C.2d 895 (1982); H. Rep. No. 97-82, 97th Cong., 1st Sess. 23-25 (1981); H. Rep. No. 97-208, 97th Cong., 1st Sess. 895 (1981).

<sup>23/</sup> Section 25(b)(3) prohibits the DBS provider from exercising any editorial control over the programming provided by the noncommercial program supplier. The Commission has requested comment on "who should be responsible for the programming in the event Commission rules or federal statutes are violated." Notice at ¶41. APTS and CPB submit that, in light of the statutory constraint on satellite licensees, the Commission can and should look to the noncommercial program supplier to enforce any violation of applicable rules or statutes. The Commission has the authority to impose fines or forfeitures on non-licensees as  
(continued...)

**D. DBS Providers Should be Able to Utilize Unused Channel Capacity Until the Noncommercial Program Supplier is Ready to Commence Operations**

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Section 25(b)(2) provides that the DBS provider should be permitted to use unused noncommercial capacity. The Commission has requested comment on whether the DBS provider's ability to use this capacity should terminate upon the signing of an agreement between the DBS provider and the noncommercial program supplier or when the noncommercial entity actually commences operations. Notice at ¶ 45. APTS and CPB support the latter interpretation.

As Congress implicitly acknowledged in enacting Section 25(b)(2), there is no benefit in allowing scarce satellite capacity to lie fallow when it could be used for programming or other purposes. Consequently, the DBS provider should not be required to relinquish capacity before the noncommercial entity is ready to provide programming. However, once the noncommercial program supplier is ready to commence operations, it must be afforded prompt, unequivocal access to the capacity.

APTS and CPB recognize, however, that the DBS providers should be given reasonable notice that a noncommercial program supplier will exercise its rights under Section 25(b). APTS and CPB suggest that noncommercial program suppliers give the DBS provider at least ten days notice of their intention to use the

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<sup>23/</sup> (...continued)

well as to issue cease and desist orders where its rules or the Communications Act is violated. 47 U.S.C. §§ 312(b) & 503(b)(2)(C).

reserved channel capacity. A ten-day notification permits those who wish to offer limited program services via DBS, such as a specific seminar, educational forum or similar event, that will not need much lead time, to gain access promptly. Ten days should give the DBS provider ample time to make whatever adjustments it needs to accommodate the noncommercial use.

**VI. The Commission Should Define Direct Costs Narrowly To Facilitate the Use of the DBS Capacity by Educational Users**

Section 25(b) requires the Commission to assure that the rates for reserved noncommercial educational channels are no greater than 50 percent of the direct costs of making the channel available. Section 25(b) also provides that direct costs may not include "marketing costs, general administrative costs, and similar overhead costs" as well as "the revenue that [the DBS] provider might have obtained by making such channel available to a commercial provider of video programming."<sup>24/</sup> The Commission seeks comment on what costs should be included in determining the appropriate rates for noncommercial program suppliers. Notice at ¶¶ 46-51.

Since the purpose of Section 25(b) is to facilitate the use of DBS capacity by noncommercial educational users, direct costs should be defined narrowly. Specifically, the Commission should be guided by the Congressional mandate that the costs must be directly related to making the DBS channel available to the

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<sup>24/</sup> Section 25(4)(C) of the Act.

noncommercial program supplier. See H. Rep. No. 102-628, 102d Cong., 2d Sess. 124-25 (1992). In accordance with this mandate, general overhead costs should be excluded from the definition of direct costs, because these costs would be incurred regardless of whether a noncommercial program supplier is given access to a channel. Id. Thus, if the noncommercial capacity is to be made available directly by the satellite licensee, the licensee's depreciation or interest expense should not be included in direct costs. Those expenses are incurred regardless of whether capacity is made available for noncommercial use and thus are not attributable to the noncommercial program supplier. Similarly, if an entity other than the licensee is to provide the capacity, the costs of the transponder should not be included in the direct costs. Such costs are similar to overhead costs, in that the licensee or other entity would have to pay them regardless of whether a channel was made available to a noncommercial program supplier.

As the Commission acknowledges, the legislative history of the Act states that direct costs should include only the costs of transmitting the signal to the uplink facility and the direct costs of uplinking the signal to the satellite. Notice at ¶ 50. Hence, APTS and CPB submit that direct costs should include only the allocable portion of the following cost items:

- encoding, compression and uplinking
- authorizing user to access the satellite
- producing, publishing and distributing program guides

- direct taxes occasioned by the sale or lease of capacity to the noncommercial program supplier<sup>25/</sup>

**VII. The Commission Should Establish an Advisory Committee to Make Recommendations Concerning the Administration of Section 25(b).**

The Commission has raised a number of complex and difficult issues in its Notice concerning the implementation of Section 25(b). APTS and CPB believe, however, that there are a number of other equally, if not more, difficult issues that must be resolved if Section 25(b) is to be effectively implemented so that the benefits Congress envisioned when it enacted that provisions can be realized. As more DBS satellites are launched and the educational potential of DBS is better understood by noncommercial entities, demands for time by noncommercial entities will increase and some formal mechanism will have to be

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<sup>25/</sup> The Commission seeks comment on the Section 25(b)(4) requirement that in determining appropriate rates, the Commission must consider the nonprofit character of the programmer to whom the capacity is provided and any federal funds used to support the programming. Notice at ¶¶ 47-48. APTS and CPB believe that the implementation of that requirement would be very difficult in

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

in place to resolve conflicting demands for noncommercial capacity.

In addition, there are important questions concerning the manner in which this programming may be funded which must be addressed. The Act is silent on what revenue sources are anticipated to defray the access charges that program suppliers will pay to DBS providers or, equally important, to support the program supplier's acquisition of DBS distribution rights for noncommercial educational programming. Accordingly, questions that an Advisory Committee might address include (1) whether noncommercial program suppliers may solicit contributions on-air during or adjacent to programs that are distributed using the noncommercial reserved capacity, and (2) whether DBS providers may agree to pay to noncommercial program suppliers some portion of their subscriber revenues.

Both the Senate and House bills of the Act contained provisions for study panels to provide Congress with guidance on these types of issues. Those panels were to make recommendations "on ways to promote the development of [educational and informationall] programming, methods of selecting programming that avoids conflict of interest and editorial control, programming funding sources" and similar matters. See H. Rep. No. 102-862, 102 Cong., 2d Sess, 99 (1992). APTS and CPB believe that the proposals to establish these panels were meritorious. Indeed, they believe that the nascent state of the DBS industry and the unknown demands for use of the noncommercial capacity make it

highly unlikely that the Commission can, at this time, develop rules that will assure the efficient administration of Section 25(b) .

APTS and CPB therefore urge the Commission to create an Advisory Committee consisting of members of the public broadcasting community, DBS satellite entrepreneurs, educational organizations and other interested parties to study the kinds of issues identified in the House and Senate bills. The Committee should make recommendations to the Commission -- and to the extent necessary to Congress -- on how best to achieve the substantial public benefits achievable through a meaningful, coordinated and comprehensive plan to implement Section 25(b) . In addition, the Committee could also explore the feasibility of a local DBS service. The Commission has used such Committees in a variety of contexts where the issues, such as these, covered a multiple of disciplines and required a detailed understanding of a new technology or businesses. The benefits of that process are evident in the current advisory committee work on HDTV. APTS and CPB are confident that similar benefits will flow from this proposed Advisory Committee and therefore strongly urge the creation of such a panel.

VIII. **By Its Terms Section 25(a) Does Not Impose  
Section 312(a)(7) Obligations On Noncommercial  
Program Suppliers**

The Commission requests comment on whether noncommercial program suppliers of reserved channel capacity should be required to comply with the political broadcasting requirements which it proposes to impose on DBS providers by Section 25. Notice at ¶ 41. APTS and CPB submit that, by its terms, Section 25 does not impose that requirement on noncommercial program suppliers.

Section 25(a) requires the Commission to adopt rules "to



under the express terms of Section 25, noncommercial program suppliers are not subject to the public interest obligations under consideration here.

This interpretation also comports with Congress' goal in enacting Section 25(b). Congress required only a small portion -- 4 to 7 percent -- of the capacity of DBS satellites to be made available for noncommercial use and intended that capacity to be used to provide "educational and informational" programming. Given the limited capacity afforded noncommercial program suppliers and the more than 1000 potential candidates who could request time under Section 312(a)(7),<sup>27/</sup> requiring noncommercial program suppliers to give federal candidates reasonable access to their DBS capacity could effectively preclude the use of that capacity for educational purposes.<sup>28/</sup>

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<sup>26/</sup> (...continued)

DBS service" in Section 25(b)(5)(A)(ii) if it used sufficient capacity to trigger the minimum requirements, i.e. under the APTS and CPB proposal, if it controlled 120 equivalent hours per day. However, in order for a noncommercial program supplier will obtain that much capacity.

<sup>27/</sup> During normal congressional election years, potentially 970 candidates for the House of Representatives plus an additional 66 candidates for the Senate -- for a total of 1,036 candidates -- would be eligible for reasonable access time. A substantially greater number of candidates for the nomination of the Democratic or Republican parties would also qualify.

<sup>28/</sup> APTS and CPB do not oppose the Commission's imposition, under the general public interest standard of the Communications Act, the equal opportunities requirements of Section 315 on noncommercial program suppliers. Different considerations obviously obtain when a programmer has given a candidate access to a facility to promote his or her candidacy than where a candidate can demand time.

The potential adverse affect of applying Section 312(a)(7) to noncommercial program suppliers would be magnified several fold, however, if the Commission should also hold that noncommercial program suppliers may not charge candidates for the use of the time, as is the case for terrestrial noncommercial broadcasters. Without the requirement that candidates pay for capacity, there is virtually no constraint on their demands for access. As a result the limited noncommercial capacity could be completely diverted to political purposes during election periods. Accordingly, APTS and CPB believe that political broadcast rules should not apply to noncommercial DBS users.<sup>29/</sup>

#### **IX. The Commission Should Encourage Localism on DBS**

Section 25(a) requires the Commission to consider whether there are opportunities for localism on DBS, and the Commission requests comment on this issue. Notice at ¶¶ 31-36. APTS and CPB understand that the current configuration of planned DBS satellites limits the feasibility of employing DBS for local programming. The footprints of the planned satellites are

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<sup>29/</sup> If the Commission decides, however, that noncommercial program suppliers are subject to the political broadcasting requirements, it should rule (a) as a matter of law that they do not have to make time available to candidates for the House of Representative and/or (b) that they may charge political candidates for providing reasonable access. The mere necessity to negotiate with a fraction of the potential 900+ House candidates would impose extreme burdens on the time and limited resources of the noncommercial program suppliers. Similarly, allowing noncommercial program suppliers to charge for access would mitigate the burdens imposed by the political broadcasting requirements.

designed to provide national or wide area coverage. Thus, programs can be made available to specific areas of the country only by controlling the ground environment, i.e., limiting those addressable DBS receivers that can receive the programs broadcast by the satellite.

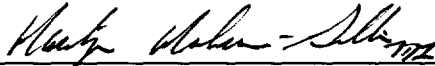
However, technology exists that would permit at least both regional, and perhaps local, high power service to be offered on DBS facilities. APTS and CPB urge the Commission to facilitate the deployment of these technologies in order to assure the continued availability of locally oriented programming to the American public. DBS may pose a threat to local broadcast television, since it permits nationwide distribution of

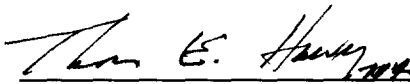
programming and content available to all DBS receivers.

**X. Conclusion**

For the foregoing reasons, the Commission should establish regulatory policies for DBS that protect and foster the development of noncommercial educational programming.

Respectfully submitted,

  
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May 24, 1993

## Appendix A

### Part 25.--- Noncommercial Educational and Informational Programming

(a) If a satellite, or any portion thereof, licensed under this Part is used for the distribution of video, audio, or other material directly to the home (DBS Service), the licensee of such satellite shall assure, as a condition of its license, that at least the following satellite and uplink capacity is made available for the distribution of educational or informational programming by national educational programming suppliers: (1) satellites with up to 5 transponders: 4% of the capacity of the transponders; (2) satellites with 6 transponders: 5% of the capacity of the transponders; (3) satellites with 7 transponders: 6% of the capacity of the transponders; (4) satellites with 8 or more transponders: 7% of the capacity of the transponders. However, no capacity need be made available pursuant to this section if less than 120 equivalent hours per day is used for DBS Service. Equivalent hours per day shall mean the number of hours of video programming made available on all the transponders on the satellite used for DBS times 24.

Note 1: If a satellite has four transponders used for DBS and the transponders are operating with a 3 to 1 compression ratio, the satellite has 288 equivalent hours per day of capacity. ( $4 \times 3 = 12 \times 24 = 288$  hrs.)

(b) The capacity of the transponders shall be calculated based on their use 24 hours per day, although the amount of time, which must be made available, may be rounded down to the nearest half-hour.

Note 2: For example, a satellite with 5 transponders would be required to make at least 4.5 hours available for noncommercial use. ( $5 \times 24 \times 4\% = 4.8$  hours).

(c) Where the capacity to be made available is less than eighteen hours per day, the capacity shall be made available between the hours of 6 a.m. and 12 midnight daily, commencing on the hour or half-hour, unless the parties agree to a different arrangement.

(d) The noncommercial program supplier shall have the right to use any subcarriers, vertical blanking interval, or other technical capabilities of transmission technology deployed, including any compression or similar techniques. The noncommercial program supplier may not, however, demand changes in the technical configuration of the satellite, e.g., the

noncommercial program supplier may not demand that the licensee make available a compression ratio not employed on the satellite.

(1) Where digital compression or a similar technology is employed, which permits the simultaneous transmission of multiple programs over the same transponder, the capacity made available pursuant to this section shall be calculated based on the configuration employed on the satellite, except that more than 7% of the capacity of transponders operating at any specific compression ratio need not be made available under this section.

Note 3: For example, if a DBS satellite has 5 transponders and is employing a 4 to 1 compression ratio on all the transponders, at least 10 equivalent